Against Physician or Surgeon by Hospital, 37 A.L.R.3d 645 (1971 & Supp. 1990), especially § 3 thereof.

A very comprehensive discussion of the propriety of judicial review of the internal affairs of private associations is contained in Note, Developments in the Law--Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963).

[9]But see Sarin v. Samaritan Health Center, 176 Mich. App. 790, 793-95, 440 N.W.2d 80, 82-83 (1989) (no judicial review of private hospital's decision to terminate medical staff privileges, not even to ensure compliance with medical staff bylaws' methods for reaching that decision); Medical Center Hospitals v. Terzis, 235 Va. 443, 445-46, 367 S.E.2d 728, 729-30 (1988), as modified upon grant of reh'g (statute on judicial review of hospitals' decisions adversely affecting existing medical staff members' privileges does not authorize judicial review of procedures employed by hospitals in reaching such decisions, as long as hospitals' decisions are in writing and are based upon certain statutorily permitted reasons).

[10]Under the Federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, as amended, both public and private hospitals are encouraged to comply with that Act's standards for adequate notice and fair hearing with respect to health care peer review, in order to be immune generally from monetary damages. See generally Colantonio, The Health Care Quality Improvement Act of 1986 and Its

Impact on Hospital Law, 91 W. Va. L. Rev. 91 (1988). This federal legislation generally applies to immunize against any state civil liability for damages pertaining to health care peer review actions commenced on or after October 14, 1989. 42 U.S.C. § 11111(c)(1) (1988).

[11] In an opinion involving events prior to the effective date of the Federal Health Care Quality Improvement Act of 1986, the Supreme Court of the United States observed that the review by a state's judiciary of medical peer review decisions typically is of a very limited nature; a court usually would not address the merits but would ensure that a reasonable procedure was afforded and that there was evidence from which it could be found that the professional conduct posed a threat to patient care. Patrick v. Burget, 486 U.S. 94, 104-05, 108 S.Ct. 1658, 1665, 100 L. Ed. 2d 83, 94 (1988).

[12] See supra note 4. As stated therein, this Court disagrees with Dr. Mahmoodian on this point.

[13] Documentary evidence, without any testimonial evidence, may be a fair procedure in some medical peer review hearings. See Woodbury v. McKinnon, 447 F.2d 839, 844 (5th Cir. 1971).

[14] In McElhinney, the court concluded that the bylaw there was impermissibly vague. Unlike here, however, the bylaw in McElhinney condemned only "gross unethical or moral misconduct[.]" 544 S.W.2d at 218. The court believed such broad language did not give sufficient notice that the

inability to work with other physicians was proscribed. It stated, though, that it "express[ed] no opinion as to the validity of a reasonably definite standard undertaking to proscribe and make a cause of termination [the] inability to work in harmony with other hospital personnel." Id. The opinion also noted that the physician's abrasive conduct could not in that case be regarded in any manner as detrimental to patient care. Id. at 217.

[15] A disruptive health care practitioner has been defined as follows:

> The disruptive practitioner is by definition, contentious, threatening, unreachable, insulting and frequently litigious. He will not, or cannot, play by the rules, nor is he able to relate to or work well with others. . . . This practitioner often falls within the classification of the impaired or sick physician, in that the underlying reason for the practitioner's abusive conduct may be a mental or emotional problem. However, that is not always the case. Sometimes the person is simply a disruptive or abrasive human being.
>
> The manifestation of disruptive behavior sometimes takes bizarre forms. The disruptive practitioner is often clinically competent. Indeed, he will believe himself to be more competent than others on the

medical staff. It is not uncommon to find that a disruptive practitioner is, in fact, highly intelligent, clinically superior, even medically outstanding. However, the reason for his disruptiveness, his inability to get along with others, sometimes affects his clinical judgment. He is totally convinced that he is right. Those who would question him or seek to have him behave differently, whether they are colleagues or not, are seen to be motivated by ignorance, stupidity, jealousy or a desire to destroy him as an economic competitor. They are also believed to be weak and vulnerable. In fact, the objects of his unacceptable behavior are most frequently those who, by virtue of their positions, are weak and vulnerable. He may not openly take on the strong and prestigious, but rather seek to undermine and intimidate those who can neither avoid him nor fight back. For these reasons, and regardless of what may cause him to act as he does, he is a formidable person.

. . . Only when personal idiosyncrasies, as expressed in words or deeds, begin to affect the ability of others to get their jobs done, or impinge on their right to go about their own business free of burdensome harassment, or when such idiosyncracies begin to interfere

> with the practitioner's ability to perform well professionally, is action by the hospital indicated.

Springer & Casale, Hospitals and the Disruptive Health Care Practitioner--Is the Inability to Work with Others Enough to Warrant Exclusion?, 24 Duq. L. Rev. 377, 383-85 (1985) (footnotes omitted).

On the record before us, this description of disruptive conduct aptly specifies Dr. Mahmoodian's continuously vituperative and uncooperative behavior. At the root of his constant harassment of colleagues, registered nurses and patients at the hospital is the deep-seated animosity between Dr. Mahmoodian and another obstetrician/gynecologist on UHC's medical staff, Dr. Rahimian. The conduct of the latter has been investigated by the medical staff on a few occasions, too.

[16] We do not address the issue raised by the amicus brief of the West Virginia Association of Nurse Anesthetists and the West Virginia Psychological Association. That issue involves the scope of judicial review of a private hospital's decision denying initial staff appointments to individuals who are not allopathic (conventional) physicians.

APPENDIX B

IN THE CIRCUIT COURT OF

HARRISON COUNTY, WEST VIRGINIA

SAEED MAHMOODIAN, M.D.,

Plaintiff,

v. / / Civil Action No. 89-C-25-1

UNITED HOSPITAL CENTER, INC.,
BRUCE C. CARTER, ALI RAHIMIAN, M.D.
and FLORENCIA C. LOPEZ, M.D.,

Defendants.

ORDER

On the 29th day of November, 1989, came the plaintiff, Saeed Mahmoodian, M.D. by his attorney, Jerald E. Jones, and came the defendants United Hospital Center, Inc. ("UHC") and Bruce C. Carter by their attorneys, Herbert G. Underwood and Irene M. Keeley, pursuant to the request of the plaintiff for permanent injunctive relief against the defendant United Hospital

Center. The original complaint sought a complete restoration of plaintiff's privileges as a medical staff appointee at UHC, including the restoration of the privilege to do Wertheim ("radical") hysterectomies. The plaintiff now seeks only a return of all such privileges other than the privilege to perform Wertheim ("radical") hysterectomies.

By Order dated February 1, 1989, this Court denied the plaintiff's motion for a preliminary injunction enjoining the defendant, United Hospital Center, Inc., from terminating the active staff privileges of the plaintiff whereupon the plaintiff, pursuant to W. Va. Code § 53-5-5, petitioned the West Virginia Supreme Court of Appeals for such preliminary injunctive relief.

By Order dated April 18, 1989, the West Virginia Supreme Court of Appeals, without stating any grounds therefor, granted the plaintiff a preliminary injunction and remanded the matter for further proceedings before the Circuit Court of Harrison County. This Court then denied the defendants' Motion to Dissolve the Preliminary Injunction granted by the Supreme Court.

Thereafter, by Order dated June 30, 1989, upon the joint application of the parties, this Court certified certain threshold questions to the Supreme Court in order to conduct further proceedings in this case as follows:

1. Is United Hospital Center, Inc., a private, not for profit hospital or is it a de facto public hospital?

   Ruling of the Circuit Court of Harrison County:

United Hospital Center, Inc. is a private, not for profit hospital.

2. Is there a distinction between the rights of a physician to staff privileges at a private hospital as opposed to a hospital operated by a governmental subdivision or agency?

Ruling of the Circuit Court of Harrison County:

Yes.

3. Is the decision of the Board of Directors of United Hospital Center, Inc. in terminating staff privileges of a physician subject to judicial review?

Ruling of the Circuit Court of Harrison County:

Yes.

4. If so, is such judicial review limited to whether the hospital procedurally complied with its bylaws or may the Court go beyond the procedural aspect and look to the subject matter and substance of the proceeding to determine if there was substantive due process?

Ruling of the Circuit Court of Harrison County:

Judicial review is limited to whether the hospital procedurally complied with its bylaws.

5. Where the medical staff bylaws of a private, not for profit hospital, operated in the manner of United Hospital Center, Inc., provides that one of the grounds for termination of staff privileges is disruptive behavior or unprofessional conduct, can the hospital terminate the staff privileges of a physician on those grounds alone or must there be a showing that the behavior complained of has a substantial adverse effect upon patient care?

Ruling of Circuit Court of Harrison County:

> The hospital may terminate the staff privileges of a physician if, in compliance with its bylaws, it determines that a physician has engaged in behavior or unprofessional conduct disruptive to the normal functioning of the hospital.

By Order dated July 5, 1989, the Supreme Court determined that the ruling of this Court upon the questions certified to this Court should not be reviewed and, therefore, refused to docket said certified

questions for hearing.

The plaintiff now seeks a permanent injunction enjoining the defendant, United Hospital Center, Inc., from terminating his active staff privileges.

Wherefore, in view of the Supreme Court's action in this matter granting the plaintiff a preliminary injunction after the denial of such injunction by this Court, the Court feels constrained to defer to the ruling of the West Virginia Supreme Court of Appeals and does, hereby, without any further findings of fact, ORDER that the plaintiff's Motion for permanent injunction enjoining the defendant, United Hospital Center, Inc., from terminating the active staff privileges of the plaintiff is GRANTED without prejudice to further proceedings in this matter.

The parties hereto object and except to the extent their respective interests are affected thereby.

By agreement of the parties, the injunction bond required by W. Va. Code §53-5-9 is hereby waived for the duration of this Order.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: /s/ November 30, 1989

/s/ Daniel L. McCarthy
Judge

APPROVED AS TO FORM ONLY:

BY: /s/ Herbert G. Underwood
HERBERT G. UNDERWOOD
Attorney for Defendants United
Hospital Center and Bruce Carter

BY: /s/ Jerald E. Jones
JERALD E. JONES
Attorney for Plaintiff
Saeed Mahmoodian, M.D.